RECENT DECISIONS.

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AGENCY—LIABILITY OF AGENT—IMPLIED WARRANTY OF AUTHORITY.—The defendant, after authorizing his solicitors to defend the plaintiff's action, became insane. His solicitors, unaware of this, defended the plaintiff's subsequent suit until they learned of their client's insanity. The plaintiff then moved that the defendant's solicitors be adjudged personally liable for the costs of the action to date. *Held,* the defendant's solicitors were personally liable on an implied warranty of their authority. *Yonge* v. *Toynbee* (Eng., Ct. App. 1909) 102 L. T. 57.

Where an agent misrepresents his authority to the injury of third persons, an action of tort lies against him only if the misrepresentation is fraudulent, and does not survive against his estate. *Pollock, Torts* (5th Ed.) 508. To remedy these defects, the courts at first charged the alleged agent upon the attempted contract as his own. *Dusenbury* v. *Ellis* (N. Y. 1802) 3 Johns. Cas. 70. The unsoundness of this ground of recovery resulted in its later repudiation, *Hall* v. *Crandall* (1866) 29 Cal. 568, in favor of the theory of the agent's implied warranty of his authority to make the contract in question. *White* v. *Madison* (1862) 26 N. Y. 117. Obviously a pure fiction which ignores the actual intent of the parties, Pollock, Torts *supra,* this doctrine was originally introduced to allow a recovery after the agent's death, *Collen* v. *Wright* (1857) 8 El. & Bl. 647, and was thereafter utilized to supply the deficiencies of the remedy in tort where the agent had acted innocently but without due diligence in ascertaining his authority. This was the extent of its application, however, for the case establishing it, *Collen* v. *Wright supra,* did not purport to overrule *Smout* v. *Ilbery* (1842) 10 M. & W. 1, which held that where an agent acts in good faith and with due diligence, he is not liable for the termination of his authority by death of his principal, a fact of which both parties have equal means of knowledge. Hence if the agent has used due diligence and his authority was terminated by operation of law, the resulting injury is not due to any breach of duty on his part and no liability should attach. *Salton* v. *New Beeston Cycle Co.* L. R. [1900] 1 Ch. 43. The principal case, overruling *Smout* v. *Ilbery supra,* makes an agent the virtual insurer of the continued existence and sanity of his principal, in apparent disregard of the proper limits of the fiction of implied warranty.

APPEAL AND ERROR—EFFECT OF STRIKING OUT EVIDENCE.—The counsel for the defendant objected to a question put to a witness by the plaintiff's counsel, but in the absence of a ruling by the trial judge, the witness answered. *Held,* the action of the court in striking the answer from the record did not cure its previous error in permitting it to be received. *Chernick* v. *Independent Amer. Ice Cream Co.* (1910) 121 N. Y. Supp. 352.

The rule of this jurisdiction, that an error in receiving incompetent evidence, if properly excepted to, can be disregarded only where it can be seen that it did no harm, *Foote* v. *Beecher* (1879) 78 N. Y. 155; *Geary* v. *Mayor* (1905) 183 N. Y. 233, has been modified to the extent that a judgment will not now be reversed unless the error appears

prejudicial to the appellant. *Post* v. *B'klyn Heights RR. Co.* (1909) 195 N. Y. 62; cf. *Collender* v. *Reardon* (1910) 42 N. Y. L. J. No. 124. The defendant is not presumed to have been prejudiced by the reception of improper evidence if the jury were specifically instructed to disregard it. *Rogers* v. *N. Y. & B'klyn Bridge* (1896) 11 App. Div. 141, 147, affirmed 159 N. Y. 556; *Riegler* v. *Tribune Ass'n* (1899) 40 App. Div. 324, aff. 167 N. Y. 542; *O'Farrell* v. *Metropolitan Ins. Co.* (1899) 44 App. Div. 554, aff. 168 N. Y. 592. The stricter view that the error is not cured by striking the evidence from the record, or by a specific instruction to the jury to disregard it, rests upon the theory that it is impossible to eradicate its effect from the minds of the jury by any instructions of the court. *Davis* v. *Pa. Ry. Co.* (1906) 215 Pa. St. 581; *Chicago City Ry. Co.* v. *White* (1903) 110 Ill. App. 23. This practice appears to be unduly solicitous of the appellant's rights at the expense of expeditious procedure, and to disregard the fact that undue delay is a denial of justice. *Post* v. *B'klyn Heights Ry. Co. supra.* While the facts reported are meager, the principal case seems to follow the stricter rule, in disregard of recent authority in its jurisdiction.

CARRIERS—CONNECTING CARRIERS—JOINT AND SEVERAL LIABILITY.—A shipper sued the original carrier for delay in delivery of a shipment of live stock by a connecting carrier. *Held,* there was no express contract imposing such liability, and no partnership agreement sufficient to make the first carrier liable for the delay of the connecting line. *Carter* v. *C. M. & St. P. R. R. Co.* (Iowa 1910) 125 N. W. 94.

In general a carrier, while under the duty to accept goods and deliver them to a connecting carrier, *Inman & Co.* v. *St. L. S. W. R. R. Co.* (1896) 14 Tex. Civ. App. 39, is liable only for injuries occurring on its own line. *The L. E. & W. R. Co.* v. *Condon* (1894) 10 Ind. App. 536. While in England and a few states the carrier's acceptance of goods consigned to a point beyond its own line constitutes a *prima facie* undertaking to carry to the designated point and renders the carrier liable wherever the injury occurs, *Muschamp* v. *Lancaster Ry. Co.* (1841) 8 M. & W. 421; *Beard & Sons* v. *The St. L. A. & T. H. Ry. Co.* (1890) 79 Iowa 527, the majority of American courts hold that, in the absence of special and express agreement, the carrier is liable only to the limits of its own line. *Myrick* v. *Mich. Cent. R. R. Co.* (1882) 107 U. S. 102. However, if the initial carrier undertakes by express contract to carry the whole distance, he constitutes the connecting carriers his agents, and is liable for any injury. *Eckles* v. *Mo. Pac. Ry. Co.* (1897) 72 Mo. App. 296; *Chicago, etc. R. Co.* v. *Woodward* (1904) 164 Ind. 360. Moreover, if a strict partnership relation exists between the carriers they are jointly and severally liable as partners. *Railroad* v. *Lamkin* (1900) 78 Miss. 502; *Champion* v. *Bostwick* (1837) 18 Wend. 175. In the absence of an actual partnership, if the undertaking of the carriers is a joint one and made either by the companies acting together under a trade name, *Block* v. *Fitchburg R. R.* (1885) 139 Mass. 308, or merely by a common agent of all the carriers, *C. R. I. & T. Ry. Co.* v. *Halsell* (1904) 35 Tex. Civ. App. 126, they are jointly liable for all injuries. Since in the principal case there was neither an express contract nor a partnership relation the decision is correct.

CARRIERS—CONTRACT OF SHIPMENT—RIGHT OF CONSIGNOR AND CONSIGNEE TO SUE.—The plaintiff sued the defendant, a carrier, for negligent delay in shipment and injury to goods which he had sold to

the consignee, the defendant's line affording the usual route and method of shipment between the plaintiff and consignee. *Held,* the plaintiff, having no beneficial interest in the goods shipped, could not maintain the action. *Parker Buggy Corp.* v. *Atlantic Coast Line R. Co.* (N. C. 1910) 67 S. E. 251.

The test of a property interest in the goods shipped as determinative of the right to sue a carrier in an action *ex delicto, Dawes* v. *Peck* (1799) 8 T. R. 330, has been extended, in several jurisdictions, to actions in *assumpsit, Madison, etc. R. Co.* v. *Whitesel* (1858) 11 Ind. 55, on the ground that the contract for carriage is in effect made for the owner. The shipment raises the presumption that the consignee is owner of the goods, *Dutton* v. *Solomonson* (1803) 3 Bos. & Pul. 582, and since the consignor, where that is true, has no further interest in them and the owner is liable for freight, Hutchinson, Carriers (3rd ed.) § 448, the consignor may reasonably be regarded as acting as his agent in making the contract. *Blum* v. *The Caddo* (1870) 3 Fed. Cas. No. 1573. Where the presumption of ownership is rebutted, as in the case of goods shipped under a void contract, *Coombs* v. *Bristol etc. R. Co.* (1858) 3 H. & N. 510, or at the shipper's risk, *Hooper* v. *Chicago & N. W. R. Co.* (1870) 27 Wis. 81, the consignee, of course, should have no right of action. It would seem to follow that a consignor without a beneficial interest cannot sue, and such is the rule of several jurisdictions. *Potter* v. *Lansing* (N. Y. 1806) 1 Johns. 215. A number of courts, however, regarding the contract as that of the consignor, permit him to recover, *Davis* v. *James* (1770) 5 Burr. 2680, although the freight was to be paid by the consignee, *Blanchard* v. *Page* (Mass. 1857) 8 Gray 281, his recovery where he has no interest being for the benefit of the owner. *Finn* v. *Western R. Corp.* (1873) 112 Mass. 524. While the ultimate result is the same in both cases, the rule adopted in the principal case seems more in accordance with the intent of the parties.

CARRIERS—LICENSEES—DISCOVERED PERIL.—A pedestrian was killed on the roadbed of the defendant which had been used for a long time by the public as a common passageway. *Held,* he was a licensee, the doctrine of "discovered peril" applied, and the railroad was liable. *C. & O. Ry. Co.* v. *Corbin's Adm'r.* (Va. 1910) 67 S. E. 179.

Since the right of way of a railroad company is its exclusive property, *C. C. C. & St. L. R. Co.* v. *Tartt* (1894) 64 Fed. 832, some courts hold that any persons going upon it without the invitation of the company, whether as trespassers or bare licensees, can only require that the company refrain from injuring them wilfully. *I. C. R. R. Co.* v. *Godfrey* (1874) 71 Ill. 500; *Glass* v. *M. & C. R. Co.* (1891) 94 Ala. 581. By the weight of authority, however, a distinction is recognized between the duty owed to trespassers, and that due licensees, *P. & R. R. Co.* v. *Hummell* (1863) 44 Pa. St. 375; *Davis* v. *The C. & N. W. Ry. Co.* (1883) 58 Wis. 646, towards whom the railroad must use reasonable care. Such a license may be implied from a general and long continued use of the tracks by the public, with the knowledge and acquiescence of the company. 8 COLUMBIA LAW REVIEW 317; *Swift* v. *S. I. R. T. R. R. Co.* (1890) 123 N. Y. 645. But whether a person, himself negligent in going upon the tracks of a railroad, can recover if the railroad discovered, or by the use of reasonable care might have discovered, his peril in time to have avoided the accident, is a more mooted question. By the decided weight of authority the doctrine of "last clear chance"

or "discovered peril" applies in such a case, Shear. & Red., Negligence, §99, and the injured party may recover. *Esrey* v. *So. Pac. Co.* (1894) 103 Cal. 541; *Deans* v. *Railroad* (1890) 107 N. C. 686; *Eckert* v. *St. L. I. M. & S. Ry.* (1883) 13 Mo. App. 352. This rule is logically applicable to licensees, and is correctly extended to trespassers in those jurisdictions where the railroads are held to owe the latter the duty of reasonable care. *Isabel* v. *Han. & St. Jo. R. R. Co.* (1875) 60 Mo. 475; *Bogan* v. *Railroad* (1901) 129 N. C. 154. The principal case is therefore unassailable.

CONSTITUTIONAL LAW—DISTRIBUTION OF POWERS—POWER OF APPOINTMENT TO OFFICE.—Under the authority of statute the complainants were appointed by the Governor to the State Board of Elections. Under an amendatory act placing the election of this board in the Legislature, the defendants were elected, and the plaintiffs asserted that the amending act was unconstitutional. *Held,* the power of appointment to office might be constitutionally conferred upon either department of government. *Richardson* v. *Young* (Tenn. 1910) 125 S. W. 664.

Under the common law the power of appointment was clearly an incident of the royal prerogative. Com. Dig., tit. Officer, A. 1.; *People* v. *Murray* (1877) 70 N. Y. 521, 525. Since in the United States the sovereign power is vested in the people and delegated by them to the various branches of government, *State* v. *Armstrong* (Tenn. 1856) 3 Sneed 634, 653, the general appointive power, in the absence of constitutional provision, is not inherent in any one branch. *Hovey* v. *State* (1889) 119 Ind. 395, 403. Hence, although the act of appointing to office is *per se* executive, the power of appointment is not incidental to that executive power conferred upon the governor by the constitution, but may be conferred by the legislature as it sees fit, by reason of its general law-making power. *Overshiner* v. *State* (1900) 156 Ind. 187. Hence the function is legislative, executive or judicial according to the department to which the law has confided its exercise, *Fox* v. *McDonald* (1892) 101 Ala. 51, 74, although in the absence of a constitutional prohibition the various governmental departments may generally appoint their respective subordinate officers. *State* v. *Noble* (1888) 118 Ind. 350, 362. Accordingly, a constitutional provision that the governor shall appoint all officers whose appointment is not otherwise provided for does not prohibit the legislature from providing or changing the mode of filling an office created by it. *Davis v. State* (1854) 7 Md. 151, 161. In the absence of some constitutional restriction, it would seem that the power to appoint may, if the statute so provide, be exercised by any of the three governmental departments. *People* v. *Freeman* (1889) 80 Cal. 233. The decision in the principal case is unquestionably sound.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—GAME LAWS.—The defendant, a common carrier, was prosecuted under the New York Game Law for transporting certain deer lawfully killed without the state. *Held,* the law in question did not attach to an interstate shipment of game from another state until final delivery to the consignee. *People* v. *Fargo* (N. Y. App. Div. 1910) 43 N. Y. L. J. No. 22.

In the absence of permission by Congress, the state police power cannot attach to an article of interstate commerce possessed by the consignee in the original package. *Leisy* v. *Hardin* (1890) 135 U. S. 100. The Wilson Act (26 U. S. Stat. at L. Ch. 728) was passed to

modify this rule as to intoxicants by providing that the original package rule should not apply to interstate shipments of liquor. Even under this act, however, the regulative power of a state may properly be exercised only upon delivery of an interstate shipment at its destination to the consignee. *Rhoades* v. *Iowa* (1898) 170 U. S. 412. Game is a proper subject of interstate commerce; and although a state may prohibit its possession during the closed season, *Silz* v. *Hesterberg* (1908) 211 U. S. 31, when its interstate transportation has properly begun it would seem to be no longer subject to state regulation. *Bennett* v. *Amer. Express Co.* (1891) 83 Me. 236. The Lacey Act (31 U. S. Stat. at L. Ch. 553), the provisions of which in regard to game are identical with those of the Wilson Act concerning liquor, was evidently enacted to remove a like limitation from the exercise of police power by the state in protecting its game. And since it is well settled that under the Wilson Act the police power does not extend to an interstate shipment in the hands of a carrier, *Adams Express Co.* v. *Kentucky* (1909) 214 U. S. 218, the decision in the principal case is sound in giving the same construction to the Lacey Act.

CONSTITUTIONAL LAW—LOSS OF RIGHT TO CONTEST CONSTITUTIONALITY OF STATUTES.—The plaintiff instituted condemnation proceedings under a statute providing for a new trial only at the discretion of the trial judge. After a verdict for the defendant and a dismissal of the plaintiff's motion for a new trial, the plaintiff appealed on the ground of the unconstitutionality of the statute. *Held,* the plaintiff was not in a position to attack the statute's constitutionality. *Southern Power Co.* v. *Williams* (S. C. 1910) 67 S. E. 136.

While it has been said that an unconstitutional enactment cannot be made valid by estoppel, *C. B. U. P. R. Co.* v. *Smith* (1880) 23 Kan. 745, 754, one may be held to have waived his right to question its validity under certain circumstances. This rule is only applied in cases where one has voluntarily subjected himself to the operation of the statute of which he complains, either by procuring its enactment, or by seeking to avail himself of its provisions. Thus a property owner who has obtained the assessment of a tax for the improvement of his land, *Hoertz* v. *Jefferson So. Power Draining Co.* (1905) 119 Ky. 824, or who has assented to the taking of his land in condemnation proceedings, *Hellen* v. *City of Medford* (1905) 188 Mass. 42, is estopped to question the validity of the statute providing for the assessment or the condemnation. Similarly, persons who have secured property by condemnation cannot contest the constitutionality of a provision of the statute from which they derive their power. *Dow* v. *Electric Co.* (1894) 68 N. H. 59. It is clear that the elements of a technical estoppel are lacking in these cases, since the party estopped has made no misrepresentation of fact. The explanation has been suggested that the party who seeks to take advantage of a statute impliedly contracts to abide by its terms. *Shepard* v. *Barron* (1904) 194 U. S. 553, 564. While this doctrine is open to the formal objection that the action to enforce the statute is not contractual, it seems desirable to prevent the pleading of the invalidity of the statute in violation of the implied agreement and thus avoid circuity of action. The result reached in the principal case is the proper one.

CONTRACTS—EXECUTORY CONTRACTS—PRICE NOT MENTIONED IN THE WRITING.—The plaintiff contracted for the exclusive right to sell for five years at retail clothing of a standard brand manufactured by

the defendant. After four years the defendant refused to complete performance. *Held,* since the contract contained no agreed price the defendant's demurrer should be allowed. *Lambert* v. *Hayes* (N. Y. App. Div. 1910) 43 N. Y. L. J. No. 22.

Without doubt price is an essential element of every contract for the transfer of property, *Scholtz* v. *N. W. Mut. Life Ins. Co.* (1900) 100 Fed. 573, and hence, for an executory written contract to be enforceable, the price must generally be certain or capable of being ascertained from the contract itself. *Ide & Smith* v. *Stanton* (1843) 15 Vt. 685. So where the price is to be fixed by a subsequent agreement, *Dayton* v. *Stone* (1896) 111 Mich. 196, or by the happening of a future event, *Buckmaster* v. *Consumers' Ice Co.* (N. Y. 1874) 5 Daly 313, the contract is void for uncertainty. It has, however, been decided that when the written contract does not purport to contain all the terms agreed upon, parol evidence is admissible to prove the price. *Becher* v. *National Cloak & Suit Co.* (N. Y. 1908) 128 App. Div. 423; *Ellis* v. *Bray* (1883) 79 Mo. 227. Moreover, some authorities state positively that in executory contracts a memorandum in which no price is fixed is sufficient to satisfy the Statute of Frauds on the ground that in such a case a promise is implied to pay a reasonable price. *Hoadley* v. *McLaine* (1834) 10 Bingh. 482; Benjamin, Sales § 85. It is difficult to see why this same implication would not arise where the Statute of Frauds is not raised as a defence. Consequently, it follows that where no evidence is offered of any agreed price and the writing is not the complete agreement of the parties, the court should hold that they intended a reasonable price. This principle has been admitted, although because of a failure to prove damages none were allowed. *Trunkey* v. *Hedstrom* (1890) 131 Ill. 204. The principal case is in accord with New York authority, however, if the writing can be considered the entire agreement between the parties, *United Press Co.* v. *New York Press Co.* (1900) 164 N. Y. 406, but such an inference seems questionable from the facts.

CORPORATIONS—NAMES—CHANGE OF CORPORATE NAME AND USE OF ASSUMED NAME.—The plaintiff sued on a contract of guaranty made to the "Beaver Dam Malleable Iron Range Co." Later the plaintiff amended its complaint by substituting its true corporate name in the title of the action and sought to show that it was the party named in the guaranty. *Held,* the amendment was proper and the proof admissible. *Malleable Iron Range Co.* v. *Pusey* (Ill. 1910) 91 N. E. 51.

Since a corporation is a creature of the state, having only such powers as the state gives it, it cannot change the corporate name conferred upon it in its charter except by legislative permission, *Sykes* v. *The People* (1890) 132 Ill. 32; *C. D. & M. R. Co.* v. *Keisel* (1876) 43 Ia. 39, and then only by strict compliance with the requirements of statute. *In re Change of Corporate Name* (1884) 107 Pa. St. 543. As the change of name does not affect the corporate identity, the rights and liabilities of the corporation on its pre-existing contracts are not thereby altered. *Dean* v. *La Motte Lead Co.* (1875) 59 Mo. 523; *Rosenthal* v. *Plankroad Co.* (1858) 10 Ind. 358. The name is usually, but not necessarily given in the charter; and where none is thus conferred, one may be acquired by implication and usage. *Smith* v. *Plank Road Co.* (1857) 30 Ala. 650. While the change of corporate names is thus restricted, a greater latitude is

permitted the corporation in the use of other names than its own. Thus, grants to or by corporations are sustained, although a mistake is made in naming, if the name used is correct in substance. *Walrath* v. *Campbell* (1873) 28 Mich. 111; *Wardens of Trinity Church* v. *Hall* (1852) 22 Conn. 125. Likewise, corporations may properly assume a name in a certain business or for particular transactions; and so a deed, *President etc. of Mount Palatine Academy* v. *Kleinschnitz* (1862) 28 Ill. 133, or a contract, *Phillips* v. *International Text Book Co.* (1904) 26 Pa. Super. Ct. 230, under an assumed name is binding on both parties where identity is shown, a fact which may be established by the ordinary methods of proof. *Marmet Co.* v. *Archibald* (1893) 37 W. Va. 778. Thus the principal case is correct, the right to amend under such circumstances being well recognized. *Smith* v. *Plank Road Co. supra.*

DIVORCE—EXTRATERRITORIAL EFFECT OF DECREE UPON CLAIM FOR ALIMONY.—The plaintiff brought an action for alimony in Kansas alleging the defendant's misconduct. The defendant set up in bar an *ex parte* decree of divorce secured upon constructive service in Missouri, upon allegations of misconduct on the part of the wife. *Held,* under the Kansas statute requiring full faith and credit to be given to divorce decrees valid where rendered, the wife's claim was *res adjudicata. McCormick* v. *McCormick* (Kan. 1910) 107 Pac. 546. See Notes, p. 555.

EQUITY—SPECIFIC PERFORMANCE—ABATEMENT FOR DOWER RIGHT.—The plaintiff sued for specific performance of a contract to convey land, the defendant being a married man. *Held,* the plaintiff was entitled to specific performance and, on the failure of the defendant's wife to release her dower right, to an abatement for the gross value of that right. *Maas* v. *Morgenthaler* (N. Y. 1910) 70 Cent. L. J. 282.

The courts of this country have refused, in the absence of collusion between husband and wife, to follow the early English practice, *Hall* v. *Hardy* (1733) 3 Peere Williams 187, of coercing the wife to release her dower right by an absolute decree against the husband for specific performance of a contract to convey land, *Henderson* v. *Perkins* (1893) 94 Ky. 207, and a number of them, regarding a decree for conveyance of the husband's interest with compensation for the value of the inchoate dower right as but a form of such coercion, will not grant this modified form of decree. *Riez's Appeal* (1873) 73 Pa. St. 485. The further objection urged against such relief, that it forces a new contract upon the vendor, *Barbour* v. *Hickey* (1894) 2 App. Cas. D. C. 207, seems hardly tenable since it is well established that equity will frequently, where the vendor is unable to convey according to the contract, decree performance with abatement. *Cleaton* v. *Gower* (1674) Finch 164. Following the rule of these cases, but overlooking the effect of such a decree upon the vendor's wife, a number of courts have given this relief on the failure of the vendor to secure a release of the dower right. *Woodbury* v. *Luddy* (Mass. 1867) 14 Allen 1. Since the granting of this form of relief rests on the fact that the vendee was induced, by the vendor's representation of ownership, to believe that the latter could convey a good title, it follows that where the vendee is not misled he is not entitled to an abatement, *Castle* v. *Wilkinson* (1870) L. R. 5 Ch. Ap. 534; *Ebert* v. *Arends* (1901) 190 Ill. 221, and it may well be

argued that where the vendee has knowledge of the vendor's married state he is chargeable with knowledge that the latter's ability to perform must depend upon the contingency of the wife's releasing her dower right. Pomeroy, Spec. Perf. § 461. The tendency shown in New York toward a view contrary to that of the principal case, *Schoonmaker* v. *Bonnie* (1890) 119 N. Y. 565; *Roos* v. *Lockwood* (1891) 59 Hun 181, nevertheless leaves the question an open one in that jurisdiction.

EQUITY—SPECIFIC PERFORMANCE—BUILDING CONTRACTS.—The plaintiff asked specific performance of a contract for the construction and operation of a logging tramway. *Held,* a decree of specific performance should not be granted since the contract is one requiring performance of personal services. *Sims* v. *Vanmeter Lumber Co.* (Miss. 1910) 51 So. 459.

At an early period Chancery found no difficulty in granting specific performance of contracts because involving the rendition of personal services, such as contracts for building and repairs. *Allen* v. *Harding* (1708) 2 Eq. Ca. Abr. 17; *Pembroke* v. *Thorpe* (1740) 3 Swanston 437. Later courts of equity refused relief in such cases, *Wakeham* v. *Barker* (1889) 82 Cal. 46, basing their refusal not on any lack of equity in the plaintiff's bill, but on their inability to enforce a decree. *Powell Duffryn Co.* v. *Taff Vale Ry. Co.* (1874) L. R. 9 Ch. Ap. 331. Influenced by the inadequacy of legal remedies, the courts sought to avoid this apparent difficulty by granting relief indirectly in some cases by means of an injunction. *Lane* v. *Newdigate* (1804) 10 Ves. 192. This form of procedure has been disapproved; *Ryan* v. *Mutual Ass'n* L. R. [1893] 1 Ch. 116, 124; and the granting of specific performance in such cases to-day shows that the theory of the courts in refusing a direct decree was without foundation. *Mayor of Wolverhampton* v. *Emmons* L. R. [1901] 1 K. B. D. 515; *Prospect Park Ry* v. *Coney Is. Ry.* (1894) 144 N. Y. 152. Some courts have decreed specific performance of contracts for a definite piece of work while refusing it in the case of a contract requiring continuous service; *Ryan* v. *Mutual Ass'n supra; Powell Duffryn Co.* v. *Taff Vale Ry. supra;* but the distinction seems unsound, since the court frequently issues a decree requiring its constant surveillance, as where it appoints a receiver for a railroad. *Joy* v. *St. Louis* (1890) 138 U. S. 1, 47. The principal case therefore is opposed to the better modern authorities.

EQUITY—SPECIFIC PERFORMANCE AT SUIT OF ASSIGNEE—MUTUALITY.—The plaintiff, as assignee of the vendee, sued the vendor for specific performance of a contract to convey land. *Held,* the plaintiff's failure to assume the obligations of the contract deprived it of the mutuality necessary to entitle him to a decree for specific performance. *Genevetz* v. *Feiring* (1910) 121 N. Y. Supp. 392.

The mutuality of obligation usually required in a contract whose performance is sought to be enforced in equity, *Flight* v. *Bolland* (1828) 4 Russ. 298, need not always exist at its inception. Thus, in a great many jurisdictions, one who has failed to sign a contract to which he is a party may nevertheless secure its performance, 3 COLUMBIA LAW REVIEW 1; *Hatton* v. *Gray* (1684) 2 Cas. in Chan. 164, on the theory that by filing the bill he makes binding his obligation. *Woodruff* v. *Woodruff* (1888) 44 N. J. E. 349. But even this amount of mutuality is not essential, since specific performance will

be decreed at the suit of one upon whom the contract purports to place no obligation. Thus the assignee of a vendee may enforce the performance of a contract to sell, *Fitzhugh* v. *Smith* (1872) 62 Ill. 486; *Dodge* v. *Miller* (N. Y. 1894) 81 Hun 102, although, since the obligations of the contract do not devolve upon him, *Hugel* v. *Habel* (N. Y. 1909) 132 App. Div. 327, he cannot be said to perfect them by filing his bill. It is true that the assignee takes possession of the land subject to the vendor's lien for the purchase price, but this claim is rather *in rem* than *in personam,* since he cannot be compelled to complete the purchase. *Champion* v. *Brown* (N. Y. 1822) 6 Johns. Ch. 398. These cases are supportable, however, by regarding the contract sought to be enforced as unilateral between vendor and assignee, by reason of the fact that the latter succeeds to the rights but not the obligations of the vendee. For since the doctrine of mutuality rests upon the theory that the remedy should be reciprocal, *Duvall* v. *Myers* (1850) 2 Md. Ch. 401, it can have no application to a contract which contemplates an obligation on the part of only one of the parties, *Howe* v. *Watson* (Mass. 1901) 60 N. E. 415, or which though originally bilateral has become unilateral through change of circumstances. *Lane* v. *May etc. Co.* (1898) 121 Ala. 296. Hence, in close analogy to the cases under consideration, specific performance will be granted to one who by tendering payment has accepted an option. *Borel* v. *Mead* (1884) 3 N. Mex. 84. The principal case fails to observe the limitations of the doctrine of mutuality.

EQUITY—SPECIFIC PERFORMANCE—NEGATIVE COVENANTS IN CONTRACTS FOR SERVICES.—The defendant was employed by the plaintiff under a contract not to enter the service of a competitor during a specified period, but in violation of this agreement he left the plaintiff's employ and undertook to act as president of a rival company. Although the defendant's services were not of a special or unique character, he had acquired confidential information and become acquainted with a secret formula. *Held,* three judges dissenting, an injunction to restrain the defendant from entering the service of the competing concern was properly granted. *The McCall Co.* v. *Wright* (N. Y. 1910) 43 N. Y. L. J. No. 3. See Notes, p. 559.

INSURANCE—FIRE INSURANCE—CARE OF PROPERTY AFTER LOSS.—The plaintiff sued upon a policy providing that in case of loss "the assured should protect the property from further damage and exhibit it as often as required to insurer's agents." After the fire he left his property in his old apartment and moved elsewhere. The *debris* was later removed, unknown to him, before the defendant's appraisers examined it. *Held,* one judge dissenting, the plaintiff could recover. *Flynn* v. *Hanover Fire Ins. Co.* (1910) 121 N. Y. Supp. 621.

Clauses like that in the principal case are substantial requirements which must be observed, unless waived, as a condition precedent to any recovery on the policy. *Thornton* v. *Ins. Co.* (1902) 117 Fed. 773. Their object is to enable the company to fairly investigate and ascertain the loss, and to detect dishonest and fraudulent practices. *Oshkosh Match Works* v. *Assurance Co.* (1896) 92 Wis. 510; *Hoffman* v. *Ins. Co.* (*N. Y.* 1863) 1 Robertson 501,520. Where the insured by his own act renders compliance with the clause impossible recovery is barred. *Oshkosh Match Works* v. *Assurance Co. supra; Astrich* v. *Ger.*

Am. Ins. Co. (1904) 131 Fed. 13. Although the plaintiff in the principal case did not actively prevent compliance, nevertheless he neglected to put the property in a condition to be examined, to guard against its removal, or to preserve it by storing it elsewhere. The condition precedent was not fulfilled; and as strict performance of conditions precedent is as necessary to recovery in insurance policies as in other contracts, failure to comply is not excused even where caused by the act of a third party. *Worsley* v. *Wood* (1796) 6 Term Rep. 710. Hence the majority opinion is unsound in law, though probably reaching an equitable result. It is another instance of the tendency of courts to construe very liberally in favor of the insured all conditions relating to the mode in which an accrued loss is to be established, adjusted and recovered. *McNally* v. *Ins. Co.* (1893) 137 N. Y. 389.

JUDGMENTS—VACATING AFTER TERM—MOTION BY STRANGER TO ACTION. —The plaintiff in 1885 foreclosed a mortgage on the land in question and purchased it at public sale. The mortgagor 21 years later by quit-claim deed conveyed to one who later moved to vacate the foreclosure decree on the ground that the court had no jurisdiction over the mortgagor. It was not denied that the plaintiff possessed a meritorious cause of action, and the grantee did not offer to reimburse him for expenditures made. *Held,* the demand of the grantee was inequitable. *Campbell* v. *Coulston* (N. Dak. 1910) 124 N. W. 689.

The distinction between judgments which are merely voidable and those which are void, as for want of jurisdiction, while not at all times observed by the courts, is well defined in the rules for setting them aside. Thus the rule that a court's control over its judgment ends with the terms at which it is rendered, *Phillips* v. *Negley* (1886) 117 U. S. 665, has no application in the case of a void judgment, *People* v. *Greene* (1887) 74 Cal. 400; *United States* v. *Gayle* (1892) 50 Fed. 169, or decree, *Ex parte Crenshaw* (1841) 15 Pet. 119, which may be set aside at any time. Moreover, a defendant who moves to vacate such a judgment at law need not show that it is unjust, *Savings Bank* v. *Authier* (1892) 52 Minn. 98, nor is it necessary, in a number of jurisdictions, that the invalidity appear on the face of the record. *Vilas* v. *P. & M. R. Co.* (1890) 123 N. Y. 440, 451; *Kohn, Leberman & Co.* v. *Haas* (1891) 95 Ala. 478 *contra.* Although it is said that a stranger to the record cannot vacate a judgment, Freeman, Judgments (3d ed.) § 91, the better view would seem to be that one who has purchased property affected by a void judgment may have such relief, *People* v. *Mullan* (1884) 65 Cal. 396; *Blodget* v. *Blodget* (N. Y. 1871) 42 How. Pr. 19, though rather as a matter of discretion than of right. *Mueller* v. *Reimer* (1891) 46 Minn. 314. Likewise the courts of equity, having regard for the stability of their decrees, do not favor the practice of disturbing them at the instance of a stranger, *Boykin* v. *Kernochan* (1854) 24 Ala. 697, and where, as in the principal case, the vacation of a decree would produce inequitable results, such relief should be denied.

LIENS—MECHANICS' LIEN—PRIORITY OF MORTGAGE.—A mortgage was given on a building in the course of erection, and recorded. Subsequently materials were furnished by third persons, respectively under a conditional contract and on the terms of a mechanic's lien, and incorporated into the structure. The respective claimants sought to foreclose. *Held,* the conditional vendor had no equitable lien, and

the liens of the mortgagee and statutory lien holders were equal. *Ward* v. *Yarnelle* (Ind. 1910) 91 N. E. 7.

Where a vendor of materials has lost his right of removal under his contract without acquiring a statutory lien, his only rights are those of an ordinary creditor; for mechanics' liens are the creation of statute and are unknown at common law. *Cincinnati R. R.* v. *Shera* (1905) 36 Ind. App. 315. For the same reason, a lien holder's rights depend wholly upon the provisions of the statute creating the lien; hence in the absence of express statutory priority a mortgagee of the realty has precedence over other lien holders. *In re Memphis Gas Co.* (1900) 105 Tenn. 268. A like result follows where the mortgage is given to provide for the erection of a building on the mortgaged premises, *Kiene* v. *Hodge* (1894) 90 Ia. 312, unless, indeed, the lienor has no notice of the mortgage through the mortgagee's failure to record his earlier claim. *Gaskill* v. *Wales' Ex'rs.* (1883) 36 N. J. E. 527. This result seems proper; for, although a mortgagee may have contemplated the creation of future mechanics' liens, this does not imply his assent to the subjection of his interest to such liens, since he looked to the improved value of the premises for security. The same reasons seem applicable where a mortgage is given during the process of construction, and accordingly it has been held that in such event the mortgage has priority over subsequently acquiring mechanics' liens. *Henry & Coatsworth Co.* v. *Halter* (1899) 58 Neb. 685; *Johnson* v. *Puritan Mining Co.* (1896) 19 Mont. 30. The decision in the principal case, therefore, while correct in holding that a conditional vendor of materials has no equitable lien, should have given priority to the mortgagee.

LIMITATION OF ACTIONS—TENANCY IN COMMON—PAYMENT BY TENANT IN POSSESSION.—The defendants' father left real estate subject to a mortgage which descended to his children as tenants in common. One son entered and remained for twenty years in exclusive possession of the premises with the permission of the co-tenants, during which period he paid the interest on the mortgage without their express authorization. *Held,* the payment of interest tolled the Statute of Limitations as to all the tenants in common. *Clute* v. *Clute* (N. Y. Ct. of App. 1910) 90 N. E. 988.

A part payment of an obligation tolls the Statute of Limitations because it constitutes an admission of liability for the whole debt and justifies an inference of a new promise to pay the unpaid portion. 10 COLUMBIA LAW REVIEW 271; *Crow* v. *Gleason* (1894) 141 N. Y. 489. Consequently, to have this effect such a payment must be made by the party obligated or by his authorized agents. *Murdock* v. *Waterman* (1895) 145 N. Y. 55. It was early decided that a payment by one of four joint and several makers of a note took the case out of the Statute as to all, *Whitcomb* v. *Whiting* (1781) 2 Doug. 652, but this has been expressly overruled in New York, *Van Keuren* v. *Parmelee* (1849) 2 N. Y. 523, and to-day a part payment by one joint debtor, *Shoemaker* v. *Benedict* (1854) 11 N. Y. 176, or by one of several distinct and separate grantees of a mortgagor, *Mack* v. *Anderson* (1901) 165 N. Y. 529, does not bind the other for there is no agency for that purpose. Although any tenant in common may pay the taxes on the whole tract and may have a lien on the interests of his co-tenants for their proportionate share, *Eads* v. *Retherford* (1887) 114 Ind. 273, this right to contribution does not arise from any principle of agency but

is compensation given for removing a common burden. *Griffith* v. *Robinson* (1883) 14 Ill. App. 377. While it has been suggested that a tenant in possession is under a duty to keep down incumbrances, *Dubois* v. *Campau* (1872) 24 Mich. 350, the mere fact of exclusive possession apparently raises no added implication of an agency for that purpose. *Butler* v. *Porter* (1865) 13 Mich. 292, 302. The situation of co-tenants seeems analogous to that of joint obligors rather than that of principal and agent, and hence, on the facts of the principal case, the decision appears unsound.

LIMITATION OF ACTIONS—TRUSTS—STATUTE OF NONCLAIM.—The intestate held property in trust for the plaintiff, but failed to make the proper disposition thereof. After lapse of the period of limitation prescribed by the Statute of Nonclaim a bill was filed against the administrator and the heirs to subject certain lands to this trust. *Held,* the claim was barred by the Statute. *Stewart* v. *Thomasson* (Ark. 1910) 126 S. W. 86.

Since the breach of an express trust amounting to a repudiation of it sets the Statute of Limitations running, *Hill* v. *McDonald* (N. Y. 1890) 58 Hun 322; 9 COLUMBIA LAW REVIEW 89, a constructive trust arising from such a breach would seem to be clearly within the Statute. Thus, a purchaser of the *res* with notice acquires title by possession for the statutory period. *Redford* v. *Clarke* (1902) 100 Va. 115. And where the *cestui* proceeds against the trustee after a repudiation of the trust, the Statute seems to run regardless of whether the specific *res* can be followed or other property of the trustee is sought to be impressed with the trust, *Keeton's Heirs* v. *Keeton's Adm'r.* (1855) 20 Mo. 530; *Felkner* v. *Dooly* (1904) 28 Utah 236, although some courts have regarded a concurrent remedy at law against the trustee as the test of the Statute's applicability. *Kane* v. *Bloodgood* (N. Y. 1823) 7 Johns. Ch. 90. Upon death of the trustee the Statute of Nonclaim, being merely a statute for the limitation of claims against the testator's estate, seems inapplicable in absence of a breach of trust, as the *cestui* is not a claimant against the general estate, but can follow the specific *res. Estate of Dutard* (1905) 147 Cal. 253; *Brown* v. *Town of Sebastapol* (1908) 153 Cal. 704. Where, however, the original *res* cannot be subjected to the trust, whether by reason of the trustee's repudiation or of a mingling with the general assets, the claim should be barred like any other merely personal claim against the estate; *Farnum* v. *Brooks* (Mass. 1830) 9 Pick. 212; *Harlow* v. *Dehon* (1872) 111 Mass. 195; and obviously the *cestui* should not acquire any greater right by seeking to have other specific property applied to the obligation. Since in Arkansas the Statute of Nonclaim expressly applies to both legal and equitable claims, all such demands are plainly barred by it. *Walker* v. *Byers* (1853) 14 Ark. 246; *Morgan* v. *Hamlet* (1885) 113 U. S. 449.

MORTGAGES—WAIVER OF MORTGAGE LIEN BY ATTACHMENT.—In an action to foreclose a mortgage the defendant pleaded that the plaintiff had waived the mortgage lien by securing an attachment on the mortgaged goods in a prior action on the mortgage note. *Held,* the attachment was not a waiver of the mortgage lien nor did it estop the mortgagee from later setting up the mortgage. *Stein* v. *McAuley* (Ia. 1910) 125 N. W. 336. See Notes, p 561.

MUNICIPAL CORPORATIONS—POWER TO TAX ANNEXED PROPERTY.—The city of Pittsburg was authorized by the legislature to tax "all real estate situated in said city owned or possessed by any railroad company * * * the same as other real estate in said city." Subsequently the cities of Pittsburg and Allegheny were consolidated and the plaintiff resisted an attempt of the city of Pittsburg to tax such property situated in the former city of Allegheny. *Held,* the defendant possessed no implied power to tax such property. *Federal St. & P. D. Pass. Ry. Co.* v. *City of Pittsburg* (Pa. 1910) 75 Atl. 662.

Although the authority to tax, when claimed by a municipal corporation, must be plainly shown, *St. Louis* v. *Laughlin* (1872) 49 Mo. 559, it may be given by implication, as when necessarily incident to an express grant. *United States* v. *New Orleans* (1878) 98 U. S. 381. A further instance is the implied power to tax property which has been annexed to the city. Since the authority vested in a municipal corporation exists over the geographical extent of the city, the legislature, when it widens this territory, must be presumed to have in mind that fact, *State* v. *Bowers* (1886) 48 N. J. L. 370, and therefore to contemplate the exercise of the same authority over the extended area. Hence it is held that the extension of a city's boundaries operates *ipso facto* to authorize the taxation of the added territory, *Hurla* v. *Kansas City* (1891) 46 Kan. 738, even for the purpose of paying debts contracted before, *Blanchard* v. *Bissell* (1860) 11 Oh. St. 96, and, according to the better view, although such land may be used solely for farming purposes. *Kelly* v. *Pittsburg* (1881) 104 U. S. 78. It follows that the authorization of a city to tax a given class of property situated therein is a grant of power which is not circumscribed by a subsequent widening of the city's territorial boundaries. The principal case is clearly unsound.

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—ALTERATION OF PLACE OF PAYMENT.—The defendant made a note upon a printed form, leaving blank the space after the word "at" in which the place of payment is usually written. The payee filled in the blank and endorsed the note to the plaintiff, a *bona fide* purchaser. *Held,* one judge dissenting, the payee had implied authority to do so. *Diamond Distilleries Co.* v. *Goth* (Ky. 1910) 126 S. W. 131.

The common law did not require a negotiable instrument to be made payable at a particular place, *Kendall* v. *Galvin* (1838) 15 Me. 131, and the same is true under § 25 of the Negotiable Instruments Law in this country. In a few states, however, statute requires a negotiable instrument to be made payable at a bank or a place certain. *Haden* v. *Lehman* (1887) 83 Ala. 243. Under the prevailing rule, where no place is specified the note is impliedly payable at the place of business or residence of the maker. *Holtz* v. *Boppe* (1868) 37 N. Y. 634. The place of payment being a material part of the contract, *Woodworth* v. *Bank of America* (N. Y. 1821) 19 Johns. 391, a change thereof without the approbation of the maker renders the instrument void. *Adair* v. *Egland* (1882) 58 Ia. 314. When the payee fills in the place of payment in the space for that purpose left blank by the maker, subsequent *bona fide* holders are protected on the theory that the act was done with the maker's implied authority. *Cason* v. *Grant Co. Deposit Bank* (1895) 97 Ky. 487; *Cox* v. *Alexander* (1896) 30 Ore. 438. This doctrine has even been invoked to uphold the validity of the altered note in the hands of the payee himself,

Waggoner v. *Millington* (N. Y. 1876) 8 Hun 142, in apparent disregard of the fact that the true basis of the *bona fide* holder's recovery against the maker is estoppel. *Redlich* v. *Doll* (1873) 54 N. Y. 234. In jurisdictions where specification of the place of payment is a necessary element of negotiability, leaving blank the place of payment confers no implied authority to fill it in. *Cronkhite* v. *Nebeker* (1882) 81 Ind. 319. As the principal case did not arise in such a jurisdiction it reaches a sound and desirable result.

NEGOTIABLE INSTRUMENTS—DISCHARGE OF INDORSER—EXTENSION OF TIME.—Before maturity of a note indorsed by the defendant the maker gave the plaintiff a series of new notes, the plaintiff agreeing to hold the old note as collateral until the new notes were paid. *Held,* this did not release the indorser and he was liable for the balance due. *National Park Bank* v. *Koehler* (1909) 121 N. Y. Supp. 640.

The well established rule that an extension of time granted to the debtor by the creditor without the consent of the surety discharges the latter, *First Nat. Bk. of Winona* v. *Pierce* (1881) 99 Ill. 272, results from the fact that the only obligation of the surety is to answer for a default of the debtor on the precise contract as originally made, *McMullen* v. *U. S.* (1909) 167 Fed. 460, and is further justified on the ground that such an extension of time by contract abridges the surety's right either to pay the debt at maturity and be subrogated to the creditor, or to compel the creditor to sue upon the original obligation. *Varnum* v. *Milford* (1840) 28 Fed. Cases No. 16,890. An apparent exception to this rule is recognized where as part of the agreement for the time extension all of the creditor's rights against the surety are reserved. *Clagett* v. *Salmon* (Md. 1833) 5 Gill & Jo. 314, 350; see *Spies* v. *Nat. City Bank* (N. Y. 1902) 68 App. Div. 70. In such a case the surety's rights are not impaired, for he may still pay the debt and sue the principal obligor, who has impliedly consented that the surety should have recourse against him. See *Kearsley* v. *Cole* (1846) 16 M. & W. 127; *Morgan* v. *Smith* (1877) 70 N. Y. 537. If the new agreement were substituted for the original contract it would be objectionable as an attempt to subject the surety to liability on a contract to which he was not a party. See *Spies* v. *Nat. City Bank* (1903) 174 N. Y. 222. Regarding the contract to extend time, however, as a promise not to sue the debtor until a given date on the original obligation, which therefore still subsists, *Skinner* v. *Sullivan* (1906) 127 Ill. App. 657, and as conditioned on the surety's refraining from enforcing his rights under the old obligation, it is seen that this difficulty is obviated and the surety is not held to an agreement which he never made. *Palmer* v. *Purdy* (1880) 83 N. Y. 144.

PARTNERSHIP—DISSOLUTION—PROCEEDINGS BY FIRM CREDITORS.—A creditor sued the continuing and retired partners of a firm upon a partnership liability, having notice of the dissolution and of the assumption by the former of the partnership liability. *Held,* Whitney, J., dissenting, the continuing partner having become the sole owner of the assets and the principal debtor, the retired partner, occupying the position of surety merely, was primarily liable, and until the remedies against him were exhausted, the creditor could not proceed against the retired partner. *Phillips* v. *Mendelsohn* (1910) 121 N. Y. Supp. 913. See Notes, p. 550.

PUBLIC SERVICE COMPANIES—DISCRIMINATION—DUTY TO FURNISH LONG DISTANCE TELEPHONE CONNECTIONS.—The defendant, a local telephone company, was under an exclusive contract to furnish long distance connections to another company. The plaintiff, a long distance telephone company, demanded similar service. *Held,* the defendant was bound to serve the plaintiff. *Home Tel. Co.* v. *G. & M. Tel. Co.* (Mo. 1910) 126 S. W. 73. See Notes, p. 557.

PUBLIC SERVICE COMPANIES—TELEPHONE SERVICE—DUTY TO TELEGRAPH COMPANIES.—The defendant telephone company was engaged in the telegraph business and refused to serve all telegraph companies. The plaintiff telegraph company demanded the installation of an instrument. *Held,* the defendant must furnish such service. *Postal Telegraph-Cable Co.* v. *The Cumberland Telegraph and Telephone Co.* (U. S. C. C. Tenn. 1910) 43 N. Y. L. J. No. 9. See Notes, p. 557.

QUASI CONTRACTS—IMPROVEMENTS—HIGHWAYS.—The plaintiff, by advice of an officer without authority, repaired a bridge on a county road. *Held,* the county must either allow him to remove the materials used or make compensation for them. *Floyd County* v. *Allen* (Ky. 1910) 126 S. W. 124.

Since a contract implied in fact depends, like an express agreement, upon the mutual assent of the parties, *Boston Ice Co.* v. *Potter* (1877) 123 Mass. 28, a promise will not be implied to pay for services rendered voluntarily, *Glen* v. *Savage* (1887) 14 Ore. 567, or officiously; *Quinn* v. *Hill* (N. Y. 1886) 4 Dem. 69; for in such case the parties must know that there is no intention to contract. *Bartlett* v. *Lowell* (1909) 201 Mass. 153. For similar reasons, since one dealing with an officer of a public corporation is bound to know the extent of that officer's authority, *Wormstead* v. *Lynn* (1903) 184 Mass. 425, he cannot recover for services rendered under an unauthorized contract which the officer makes with him. *Zottman* v. *San Francisco* (1862) 20 Cal. 96. Moreover, where a corporation is prevented by law from contracting for certain services, no contract will be implied in law to make compensation for such services if rendered; *Zottman* v. *San Francisco supra;* for this would be, in effect, to enforce the forbidden contract by means of a legal fiction. Where, indeed, services are rendered under a supposed contract of this nature, *Louisiana* v. *Wood* (1880) 102 U. S. 294, or one outside the statutory powers of the corporation, *Chapman* v. *County of Douglas* (1882) 107 U. S. 348, a contract may be implied in law to return the benefits received for the sake of putting the parties *in statu quo.* But where the services rendered consist of improvements which have been affixed to the realty, they become a part of the land and there would seem to be no obligation either to return or pay for them. *Mueller* v. *The C. M. & St. P. Ry. Co.* (1901) 111 Wis. 300; *Dutton* v. *Ensley* (1898) 21 Ind. App. 46. Since in the principal case there was no basis for implying in law or fact a promise to make compensation, and the improvements had been affixed to the realty, the decision is difficult to support on principle.

REAL PROPERTY—FIXTURES—BUILDING ERECTED BY LESSEE.—A lessor agreed with his lessee that the latter might remove any building that he should erect upon the land, which had previously been mortgaged. The lessee erected a frame store building and sublet to the defendant.

The plaintiff, who had notice, bought the land at the foreclosure sale. *Held,* the building remained personalty, and the defendant was entitled to remove it. *Shelton* v. *Piner* (Tex. 1910) 126 S. W. 65.

A structure designed as an improvement of the freehold is generally regarded as a fixture even when erected by another than the owner of the land. Ewell, Fixtures 51. Several courts have decided, however, that if the parties intend a building to remain personalty, it does not become a fixture, although designed solely for the beneficial use of the land. *Bridges* v. *Thomas* (1899) 8 Okla. 620. Thus, a building erected with the owner's permission and under an agreement that the builder might remove it, does not become a part of the realty. *Andrews, Ordway & Green* v. *Auditor* (Va. 1877) 28 Gratt. 115. Such an agreement has been implied from the mere license to build; *Merchants Nat. Bank* v. *Stanton* (1893) 55 Minn. 211; and this conclusion has even been reached where the consent of the owner was obtained subsequently to the erection. *Fuller* v. *Tabor* (1855) 39 Me. 519; *Madigan* v. *McCarthy* (1871) 108 Mass. 376 *contra.* The agreement confers the status of personalty on the thing annexed, however, only as between the parties and those claiming under them with notice, an innocent purchaser of the land acquiring good title to the structure, *Brennan* v. *Whitaker* (1864) 15 Oh. St. 446, a result insupportable on common law principles. The cases can be reconciled, it is submitted, on the doctrine that the status of the building as realty is determined by the annexation, while the agreement of the parties, which affects as well all subsequent purchasers with notice, merely gives a license to sever the building and turn it into personalty. *Powers* v. *Dennison* (1858) 30 Vt. 752. This view avoids the further anomaly of allowing a contract to determine the status of property. Since a mortgagor should acquire no right in equity to a structure thus erected subsequently by a third person, *Davenport* v. *Shants* (1871) 43 Vt. 546, a purchaser with notice at a foreclosure sale obtains no better right. The principal case arrives at the correct result by unsound reasoning, which, however, is adopted by the majority of the cases.

STATUTES—NAMES—PROPERTY IN FICTITIOUS FIRM NAME FORBIDDEN BY STATUTE.—The plaintiff's testator conducted his business under the name of "Jenner & Co." contrary to § 22 of the Partnership Law (N. Y. Consol. Laws c. 44 Art. 3) prohibiting the use of "& Co." where no actual partner is represented thereby. The plaintiff as executrix sold the right to use the name to the defendant, who upon suit for the purchase price pleaded failure of consideration. *Held,* one judge dissenting, the plaintiff could recover. *Jenner* v. *Shope* (1910) 121 N. Y. Supp. 599.

Since the object of the statute is to prevent the obtaining of credit under fraudulent representations and not the giving of credit, *Kennedy* v. *Budd* (N. Y. 1896) 5 App. Div. 140, it is obvious that its violation by a creditor does not justify the debtor in refusing to pay his debt, *Gay* v. *Seibold* (1884) 97 N Y. 472; for the statute being highly penal in nature is construed strictly, *Castle Bros.* v. *Graham* (N. Y. 1903) 87 App. Div. 97; *Zinnerman* v. *Erhard* (1880) 83 N. Y. 74, and is not deemed to deny protection to the property rights of the violator. *Wood* v. *Erie Ry. Co.* (1878) 72 N. Y. 196; *Kennedy* v. *Budd supra.* Hence a vendor doing business under a prohibited

firm name should be allowed to recover the purchase price of property sold. Where, however, the value of that property itself is affected by the statute, a different situation arises. Such would seem to be its effect in the principal case; for, as the dissenting opinion points out, although § 440 of the Penal Law (N. Y. Consol. Laws c. 88 Art. 40) provides for the use of an assumed firm name upon filing a certificate, § 924 of the Penal Law (N. Y. Consol. Laws c. 88 Art. 86) clearly makes a distinction as to fictitious co-partnership names, such as "& Co." when no actual partner exists, and together with § 22 of the Partnership Law (N. Y. Consol. Laws c. 44 Art. 3) expressly forbids their use except in continuation of a previous actual partnership as provided in § 20 of the Partnership Law *supra*. The principal case obviously does not fall within this exception, and as the plaintiff did not pass to the defendant a name which the latter could lawfully use, there was a total failure of consideration which should have prevented a recovery.

TAXATION—EXEMPTIONS—ALIENABILITY OF CONTRACT EXEMPTION.—A railroad had a contract exemption from taxation. The state constitution, adopted subsequently, prohibited the granting of exemptions from taxation. On foreclosure under a mortgage, all the property, rights and franchises of the railroad company were bought in by the state and later granted by it to the defendant, who resisted payment of taxes. *Held*, the grant by the state did not carry the exemption to the grantee. *Great Northern Ry. Co.* v. *Minnesota* (U. S. 1910) 30 Sup. Ct. Rep. 344.

Immunity from taxation arising by contract may be either a personal privilege or a right annexed to property. If the exemption was an inducement for entering into the purchase of the specific property, it attaches to that property in whosesoever hands it may come. *New Jersey* v. *Wilson* (1812) 7 Cranch 164; *Water Co.* v. *Campbell* (1906) 75 S. C. 34. The exemption is not a franchise, and, if it has not attached to the specific property as an incident thereto, it is a mere personal privilege incapable of transfer except by express statutory authorization. *Morgan* v. *Louisiana* (1876) 93 U. S. 217. As an exemption from taxation is in derogation of a public right and of an inherent power of government, a contract exemption will always be construed as narrowly as possible. *Morris Canal & Banking Co.* v. *State Board of Assessors* (1908) 76 N. J. L. 627. Applying this settled rule of strict construction to the facts in the principal case, a purchaser at the foreclosure sale would not obtain the benefits of the contract of exemption. But even if the exemption passed to the state as incident to the property, the immunity ceased upon the transfer; for it is inconceivable that the state could hold property exempt as against itself. On both grounds, therefore, the case is well considered.

TAXATION—ILLEGAL ROAD TAX—INJUNCTION.—The plaintiffs who were tax payers brought a bill to enjoin the collection of an illegal road tax, alleging threatened irreparable damage and lack of legal remedy. *Held*, one judge dissenting, the injunction should issue since there was a want of power to impose the tax. *Byers* v. *Hempfield Tp.* (Pa. 1910) 75 Atl. 415. See Notes, p. 564.

WILLS—VALIDITY—WIDOW'S ELECTION.—Testator devised to his wife a life estate in all his real property, remainder in a specific half to the plaintiff, his favorite son, and remainder in the other half to the rest of his children equally. The widow elected to take against the will and one half of the estate was assigned to her in fee simple, including the land in which the plaintiff's interest had been created. *Held,* the election made it impossible to enforce the other provisions of the will and the land therefore must pass under the intestacy laws. *Fennell* v. *Fennell* (Kan. 1910) 106 Pac. 1038. See Notes, p. 553.